ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JAN 12 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND BELLSOUTH WIRELESS CABLE, INC.

William B. Barfield
Thompson T. Rawls, II
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(770) 673-2827

THEIR ATTORNEYS

January 12, 1999

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Commission's *Notice of Proposed Rulemaking* ("*NPRM*") is of critical importance to BellSouth Corporation and its multichannel video subsidiaries, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth"). It is beyond argument that BellSouth's wired and wireless cable systems throughout the southeastern United States cannot compete on equal footing with incumbent cable operators if they are denied full and fair access to broadcast programming. Absent that competition, consumers will be denied the opportunity to choose from the widest possible selection of multichannel video programming distributors ("MVPDs") in local markets, a scenario which Congress has repeatedly attempted to *eliminate* in the Cable Consumer Protection Act of 1992 (the "1992 Cable Act"), the Telecommunications Act of 1996 and, most recently, Title I of the Intellectual Property and Communications Act of 1999 (the "1999 Act"). Accordingly, the Commission's resolution of the retransmission consent issues raised in the *NPRM* will have a direct and immediate impact on whether Congress's vision of a fully competitive MVPD marketplace will become reality for alternative MVPDs and their customers.

Section 1009(a) of the 1999 Act requires the Commission to adopt rules that, until at least January 1, 2006, require broadcasters to negotiate their retransmission consent agreements in "good faith," a term which is undefined in the statute. The statute permits broadcasters to offer retransmission consent to different MVPDs under different terms and conditions, provided that such differences are based on "competitive market considerations," a term which also is undefined in the statute. In other words, unlike the case with program access, Congress afforded the Commission broad discretion to define what constitutes "good faith" retransmission consent negotiations, provided that the Commission's definition is consistent with the pro-competitive purposes of the 1999 Act. For the reasons set forth herein, BellSouth urges the Commission to use that discretion to incorporate strong anti-discrimination criteria into its definition of "good faith," and to declare that *per se* violations of the "good faith" requirement at a minimum will include:

- any attempt by a broadcaster to impose non-optional tying arrangements on a competing MVPD as a condition of retransmission consent;
- as to optional tying arrangements, any attempt by a broadcaster to extract discriminatory consideration from a competing MVPD for any affiliated cable network programming the broadcaster makes available to incumbent cable operators in tandem with retransmission consent, unless the broadcaster sustains a high burden of proof that such consideration is cost-justified or otherwise represents a legitimate economic benefit that does not have the purpose or effect of producing anticompetitive market conditions; and
- any attempt by a broadcaster to tie retransmission consent to an MVPD's attainment of a minimum subscriber penetration level.

Section 1009(a) also requires the Commission to adopt rules that, until at least January 1, 2006, prohibit broadcasters from entering into exclusive retransmission consent agreements with any MVPD. BellSouth also believes that the Commission has incorrectly assumed in the *NPRM* that by this provision Congress intended to divest the agency of any jurisdiction whatsoever to prohibit exclusive retransmission consent agreements as of January 1, 2006. Section 1009(a) only states that the Commission must continue to prohibit such agreements until that date; the statute says nothing about the Commission 's jurisdiction to do so after that date. It is well settled that where Congress intends to repeal a Commission rule or sunset the Commission's regulatory authority in a particular area, it does so explicitly; to read Section 1009(a) otherwise not only runs afoul of basic principles of statutory interpretation, but exposes alternative MVPDs and their customers to an unacceptable risk that they eventually will lose access to broadcast programming without any recourse under the Commission's Rules.

Finally, the Commission's efforts to enforce the exclusivity/good faith provisions of the 1999 Act will have little deterrent effect unless the Commission's retransmission consent procedures for aggrieved MVPDs minimize delay and provide them with access to the minimum information necessary to sustain a claim of unlawful exclusivity or discrimination. To that end, BellSouth recommends that the Commission afford aggrieved MVPDs expedited retransmission consent complaint procedures under Section 76.7 of the Commission's Rules, requiring that (1) the defendant's answer be filed within fifteen (15) days of the filing of the aggrieved MVPD's complaint; (2) the complainant's reply pleading be filed within seven (7) days of submission of the defendant's answer; and (3) a final decision be rendered by the Cable Services Bureau no later than 45 days from the close of the pleading cycle. Further, in recognition of the fact that documents essential to proving a claim of unlawful exclusivity or discrimination are often in the exclusive possession of the defendant, BellSouth further requests that the Commission require an aggrieved MVPD to sustain only a relatively low burden of establishing a *prima facie* case, and that the Commission require the defendant broadcasters(s) in such cases to produce their retransmission consent agreements with incumbents for review by the plaintiff and the Commission, subject to whatever type of protective order the agency deems appropriate under the circumstances.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND BELLSOUTH WIRELESS CABLE, INC.

BellSouth Corporation and its subsidiaries, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth"), by their attorneys, hereby file their comments with respect to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1/]

I. INTRODUCTION.

BellSouth is a competitive provider of multichannel video service in markets throughout the southeastern United States, using both wired and wireless cable technologies. Specifically, BellSouth currently holds 21 franchises to provide cable "overbuild" service in local markets throughout its telephone service area, representing approximately 1.4 million potential cable households. BellSouth has already launched

---

[1/] FCC 99-406 (rel. Dec. 22, 1999).

cable overbuild service in Vestavia Hills, Alabama; Chamblee, Cherokee County, Cobb County, DeKalb County, Duluth, Gwinnett County, Lawrenceville, and Woodstock, Georgia; St. Johns County, Dade County, Pembroke Pines, and Davie, Florida; and Daniel Island, South Carolina. In addition, BellSouth is negotiating to obtain cable franchises to serve additional communities in and around major metropolitan areas throughout the Southeast.[2]

BellSouth also holds Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") channel rights covering approximately 3.5 million homes in several large markets in Florida, and in Atlanta, New Orleans and Louisville. The company has already launched digital wireless cable service in New Orleans, Atlanta and Orlando, and has begun providing that service on a limited basis in Jacksonville and Daytona Beach.[3] In Atlanta, for example, BellSouth's wireless system

---

[2] A number of communities where BellSouth provides or plans to provide cable overbuild service are located outside of major television markets, and thus may not receive direct broadcast satellite ("DBS") "local into local" service for some time. In these areas, BellSouth represents the only competitive provider of multichannel video service capable of offering a full menu of local television stations. *Cf.* Remarks of Rep. Rick Boucher, 145 Cong. Rec. H2319 (daily ed. April 27, 1999) ("I am concerned, however, that the business plans of the [DBS] carriers that have announced an interest in offering the local-to-local services extend only to the largest 67 out of 211 local television markets around the country. Under this plan, most of rural America simply will not receive the benefit of this local-into-local service."); Neel, "DBS Future Looks Bright," *Cable World*, at 9 (January 3, 2000) ("Only four major broadcasters -- ABC, CBS, NBC and Fox - - as well as the national PBS feed will be available on DBS broadcast tiers. Independents and network affiliates from the WB and UPN won't be available to DBS customers. That may not sound like a big deal. But in many markets local broadcast rights for sports teams often go to a local independent station.").

[3] BellSouth operates analog wireless cable systems in Louisville, Kentucky, Ft. Myers and Lakeland, Florida. BellSouth also holds the MDS/ITFS channel rights to serve Miami,

offers 160 channels (including 30 audio channels) of digital service in direct competition with cable multiple system operators ("MSOs"), including MediaOne Group, Time Warner and Comcast.[4] To date, BellSouth has invested hundreds of millions of dollars to acquire wireless cable channel rights, deploy transmission and reception equipment, establish the operational infrastructure necessary to develop competitive digital wireless cable systems, and provide distance learning facilities and opportunities for local ITFS licensees.

Despite this level of commitment and expertise, BellSouth's efforts to promote consumer choice will be severely compromised if wired and wireless cable systems are unable to obtain nondiscriminatory access to broadcast programming provided exclusively by local television stations. Indeed, BellSouth and other competitive multichannel video programming distributors ("MVPDs") already do not have full and fair access to *cable* programming, and, in the wake of increased cable MSO consolidation and adverse Commission precedent, are now at even greater risk of losing access to regional sports and other popular cable networks that consumers

---

Florida.

[4] *See* "Wireless Crossroads: Digital, Data and Telephony," *Cable World*, at 93 (June 29, 1998); Schofield, "Rolling Out Digital Wireless Cable," *Wireless Voice Video Data*, at 27 (May/June, 1998). The service includes local broadcast stations plus basic and premium cable networks. Pay-per-view movies are offered on a near video-on-demand basis through BellSouth's Express Cinema™ service. Express Cinema™ delivers 50 near video-on-demand channels, which can be ordered from an interactive on-screen-guide. Movies typically cost $3.99 each.

demand.[5] Any Commission rules or policies that threaten BellSouth's access to broadcast programming will only worsen the problem, and BellSouth's customers will suffer the consequences.[6] Accordingly, the Commission's resolution of the retransmission consent issues raised in the *NPRM* is of critical significance not only to BellSouth and other MVPD competitors, but to all consumers who desire a *bona fide* choice of MVPDs in local markets.[7]

Of greatest concern to BellSouth at this time is the Commission's interpretation and implementation of Section 1009(a) of the Intellectual Property and Communications Act of 1999 (the "1999 Act"), which in relevant part requires the Commission to adopt new retransmission consent rules that, until at least January 1, 2006, require local television stations to negotiate retransmission consent agreements in "good faith," and

---

[5] *See, e.g., EchoStar Communications Corporation v. Comcast Corporation et al.*, 14 FCC Rcd 2089 (CSB, 1999); *DirecTV, Inc. v. Comcast Corporation et al.*, 13 FCC Rcd 21822 (CSB, 1998).

[6] *See, e.g., Outdoor Life Network and Speedvision Network*, 13 FCC Rcd 12226, 12236 (CSB, 1998) ("Access to programming by all non-cable MVPDs is crucial to the development of vigorous and widespread competition in the distribution market.") ("*Outdoor Life*").

[7] The mere fact that some wireless cable operators may offer two-way, non-video services in no way diminishes the relevance of retransmission consent issues to BellSouth and other terrestrial MVPDs who offer competitive multichannel video service. Indeed, recent trends in the marketplace reflect that wireless cable operators intend to offer both video and non-video services in order to compete effectively with AT&T and other cable MSOs who provide those services in "bundles" that are tailored and priced according to the specific needs of each customer. *See, e.g.,* "MCIW's Wireless Cable Plans Cover Wholesaling, Small Business," *Communications Daily*, at 2 (July 14, 1999) (noting that MCI's wireless cable strategy includes continuing service to video customers, including those using analog technology); Hogan, "Desert High-Speed Data Duel," *Multichannel News*, at 10 (Sept. 7, 1998) (discussing MMDS operator People's Choice TV Corp.'s high-speed Internet access and digital video services in the Phoenix market).

prohibit them from entering into exclusive retransmission contracts with any MVPD. The legislative history of the 1999 Act reflects that Congress adopted the "good faith" requirement to preclude local television stations from discriminating against alternative MVPDs who compete with incumbent cable operators, and thus BellSouth urges the Commission to adopt strong nondiscrimination criteria which put all MVPDs, broadcasters and consumers on notice as to what sorts of conduct will be deemed *per se* violations of the "good faith" rule.

BellSouth also believes that the Commission has mistakenly assumed that Congress intended in Section 1009(a) to strip the agency of any authority whatsoever to regulate exclusive retransmission consent agreements after January 1, 2006. This reading of the statute not only violates fundamental principles of statutory interpretation, but exposes competing MVPDs and their customers to an unacceptable risk that incumbents will use their market power to obtain a *de facto* monopoly over retransmission of local broadcast programming. Simply put, under no circumstances should the Commission abandon its authority to regulate exclusive retransmission consent agreements unless Congress explicitly instructs it to do so.

In addition, to ensure swift and effective Commission enforcement of the good faith/exclusivity provisions of Section 1009(a), BellSouth asks that the Commission adopt expedited special relief procedures for exclusivity/good faith complaints filed by alternative MVPDs. Specifically, the procedures should require that (1) the defendant's answer be filed within fifteen (15) days of the filing of the aggrieved MVPD's complaint;

(2) the complainant's reply pleading be filed within seven (7) days of submission of the defendant's answer; and (3) a final decision be rendered by the Cable Services Bureau no later than 45 days from the close of the pleading cycle. BellSouth further requests that the Commission minimize any disruption to an aggrieved MVPD's service by imposing on complainants a relatively low burden of establishing a *prima facie* case, and by requiring the defendant broadcasters(s) in such cases to file with their answer their retransmission consent agreements with competing incumbents for review by the plaintiff and the Commission, subject to whatever type of protective order the agency deems appropriate under the circumstances.

II. DISCUSSION.

A. Congress Afforded The Commission Broad Discretion To Incorporate Strong Anti-Discrimination Criteria Into Its Definition Of "Good Faith" For Purposes Of Retransmission Consent.

As noted above, Section 1009(a) requires the Commission to adopt rules that, until at least January 1, 2006, require a broadcaster to negotiate retransmission consent in "good faith," a term which is undefined in the statute. Section 1009(a) further provides that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive market considerations." Once again, Congress chose not to define the term "competitive market considerations," nor did it impose any limitations on how the term should be defined. In other words, Congress has given the Commission the widest possible discretion to define "good faith" and the various elements thereof, including "competitive market considerations." For the reasons set forth below, BellSouth believes that the Commission can and should use that discretion to incorporate the strongest possible anti-discrimination criteria into its definition of "good faith" for purposes of retransmission consent.

First and foremost, it must be remembered that Congress originally adopted the retransmission consent provisions of the 1992 Cable Act to counteract cable's market power *vis-a-vis* local television stations. More precisely, Congress found that cable networks and local broadcasters compete against each other for advertising dollars, but that cable networks effectively were being subsidized with cable system revenues attributable to carriage of local broadcast signals.[8] Congress thus attempted to level the playing field by giving local broadcasters the right to insist on compensation as a *quid pro quo* for cable carriage of their programming, and to deny cable systems the right

---

[8] *See* S. Rep. 102-92, 102d Cong., 1st Sess., at 35 (1991) ("Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors."); *see also* Comments of The Association for Maximum Service Television, Inc., CS Docket No. 98-120, at 16 (filed October 13, 1998) ("Cable operators remain vertically integrated and are becoming more horizontally integrated. They control the gateway to almost 70% of American television households and increasingly make significant inroads into local advertising markets. As a result of all these factors they have strong incentives to exclude or disadvantage local television signals that compete for advertising . . . .") (the "MSTV Digital Must-Carry Comments").

to carry that programming where an agreement as to compensation has not been reached.

As the Commission has found time and again, cable's market power persists to this day.[9] Indeed, the growth of DBS notwithstanding, cable's market power has increased to the extent that consolidation among the cable MSOs forces a local broadcaster to deal with a single cable operator who controls the lion's share of the subscribers in a given local broadcast market.[10] Gone are the days when each local broadcast market was fragmented among several cable operators, none of which individually exercised dominant control over the entire market. As a result, local television stations are now even more beholden to incumbent cable operators than they were in 1992. It therefore is no surprise that incumbent cable operators repeatedly

---

[9] *See, e.g., Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 Ghz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, FCC 99-379, at ¶ 30 (rel. December 13, 1999) ("[W]hile there has been increased entry into the MVPD services market, the incumbents continue to hold dominant positions.") (the "*LMDS Sixth NPRM*").

[10] Comcast, for example, has recently initiated or completed transactions that will give it control - - or the option to control - - all but one of the cable systems in the Washington, D.C. metropolitan area, plus the cable system serving nearby Baltimore, Maryland. Leibovich, "Comcast to Control Area Cable," *The Washington Post*, pp. E1, E10 (May 6, 1999). *See also* Comments of Viacom Inc., MM Docket No. 98-35, at 20-21 (filed November 19, 1999) ("The practical effect of the [new cable horizontal ownership rules] is to allow a single cable operator . . . to serve as much as approximately 37 percent of all U.S. television households. In that 37 percent of the country, however, a cable operator is likely to be the *only* cable operator.") (emphasis in original); Comments of Ameritech New Media, Inc., CS Docket No. 99-230, at 9 (filed August 9,1999) ("As of July 1, 1999, Chicago, Illinois was served by seven cable incumbents . . . . However, after the completion of several systems swaps and purchases, it is expected that AT&T/TCI will own virtually all of the cable fiber plant in the Chicago area.").

demand and receive exclusivity from broadcasters where the Commission's Rules allow them to do so. For instance, it is well known that NBC surrendered exclusivity for the MSNBC cable network to incumbent cable operators in exchange for carriage of NBC broadcast stations.[11] Similarly, during retransmission consent negotiations for CBS stations, CBS surrendered exclusivity with respect to its own news-oriented channel, Eye on People.[12]

None of the above, however, bears any resemblance to BellSouth's competitive position *vis-a-vis* local television stations. In marked contrast to incumbent cable operators, BellSouth's wired and wireless cable systems enter the market with no subscribers and thus do not have "market power" under any reasonable definition of that term.[13] Not surprisingly, the result is that BellSouth can exert little or no leverage when negotiating retransmission consent agreements with local television stations.[14]

---

[11] *See, e.g.*, "Continental, Comcast to Pick Up Fox News," *Media Daily* (Sept. 25, 1996); "NBC's Wright Says Fox-Time Warner News Deal Imminent," *Media Daily* (July 15, 1996).

[12] *See* "TCI Defends Exclusive Carriage Deals to Senate," *Media Daily* (October 13, 1997); Leibowitz, "The New Cable Economics," *Cable TV Media Law & Finance*, at 6 (March 1997).

[13] Indeed, in communities where BellSouth has activated cable overbuild service, its cable plant currently passes less than 10% of all potential cable households. Moreover, due to the unavoidable coverage limitations associated with line-of-sight technology, BellSouth's wireless cable systems do not as of yet enjoy the same marketwide coverage currently provided by incumbent cable operators.

[14] While it is true that cable overbuilders and wireless cable operators compete to some extent with local broadcasters for advertising dollars, their competitive share of those dollars is minuscule and, importantly, they must also compete with incumbent cable operators for those same dollars. Indeed, a cable overbuilder or wireless cable system with no or few subscribers is at a decided economic *disadvantage* vis-a-vis local broadcasters and incumbent cable operators who already enjoy marketwide distribution

Second, unlike the case when Congress passed the 1992 Cable Act, incumbent cable operators now hold material ownership interests in broadcast networks, providing them with yet another source of influence over the retransmission consent process:

> [T]he content of the broadcast stations that are carried, even when carried pursuant to mandatory obligations, is not totally divorced in terms of ownership and editorial voice from the cable systems involved. There are significant ownership ties between a number of the broadcast networks . . . and cable television system operators, including, for example, significant AT&T (Liberty) ownership interests in News Corp. (the Fox networks), Time Warner and MediaOne ownership in The WB network, AT&T (Liberty) ownership in Telemundo, and Comcast and AT&T interests in QVC and HSN.[15]

---

of their product and thus are far more attractive as an advertising medium to national and local advertisers. As a practical matter, cable overbuilders and wireless cable operators gain no material economic advantage by refusing to carry local broadcast stations, inasmuch as it would diminish the attractiveness of their service and thus limit the growth of their systems, decreasing their value as an advertising medium. Moreover, unlike the cable MSOs, BellSouth and other competing MVPDs usually do not hold ownership interests in cable programming services that compete with broadcast network programming for advertising revenue.

[15] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 - Horizontal Ownership Limits*, MM Docket No. 92-264, FCC 99-289, at ¶ 15 (rel. October 20, 1999). As the Commission has observed elsewhere, a cable MSO may wield significant influence over a business entity even where it does not hold a controlling ownership interest therein. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules*, CS Docket No. 98-82 and CS Docket No. 96-85, FCC 99-288, at ¶ 36 (rel. October 20, 1999) ("An individual or firm does not need actual operational control over (or to be the management of) a company in order to exert influence and control over that company"); *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150 *et al.*, at ¶ 154 (rel. Aug. 6, 1999) (noting that the potential exists "for certain substantial investors or creditors to have the ability to exert significant influence over key licensee decisions through their contract rights, even though they are not granted a direct voting interest or may only have a minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much or more

Finally, it is important to remember that local television stations already have must-carry rights for their analog signals on BellSouth's cable overbuild systems, and are now lobbying the Commission to extend must-carry rights to their digital television ("DTV") signals as well. In support, local television stations assert that DTV must-carry is necessary to preserve the economic viability of free over-the-air television, and, therefore, the provision of local broadcast service to the public:

> Broadcasters whose DTV signals are not carried fairly or at all on cable will face economic harm of the highest order. Lacking the chance to "sell" their product to the public, they could be forced to operate two signals at great expense for an unlimited period of time, all the while losing existing viewers to digital services that have made it through the cable gateway.[16]

By the same token, and as demonstrated quite emphatically during Fox's recent retransmission consent dispute with Cox Communications in Fairfax County, Virginia, a broadcaster with sufficient negotiating leverage will not hesitate to "sell" its product to cable systems and withhold local broadcast service from cable subscribers unless cable operators capitulate to the broadcaster's demands.[17] As alluded to recently by Commissioner Tristani, broadcasters cannot have it both ways: if one assumes for the sake of argument that the public interest in preserving local television service is compelling enough to require a cable overbuilder with no market power to surrender

---

influence or control over some corporate decisions as voting equity holders whose interests are attributable.").

[16] Comments of The Association For Maximum Service Television, Inc., CS Docket No. 98-120, at 16 (filed Oct. 13, 1998).

[17] See Kumar, "Prospects Dim For Cox-Fox Retransmission Consent Agreement," *Communications Daily*, at 4 (January 4, 2000).

valuable channel capacity to local analog *and* digital television stations, then it is also compelling enough to prohibit a broadcaster from withholding local television service to extract unreasonable economic concessions from that same overbuilder in exchange for retransmission consent.[18]

BellSouth therefore submits that all of the above warrants the inclusion of strong non-discrimination criteria in the Commission's definition of "good faith" retransmission consent negotiations, so that BellSouth and other alternative MVPDs are not placed at an even greater competitive disadvantage when negotiating retransmission consent agreements with local television stations. Further, in view of the often insurmountable difficulty of proving discrimination in the absence of a precise definition of "good faith," it is equally imperative that the Commission develop specific, clearly defined examples of conduct that will constitute *per se* violations of the "good faith" requirement, and thereby facilitate "swift and effective enforcement" thereof.[19]

---

[18] *See* Separate Statement of Commissioner Gloria Tristani re: *Public Interest Obligations of TV Broadcast Licensees (Notice of Inquiry)*, MM Docket No. 99-230, at 3 (Dec. 20, 1999) ("The public interest must be considered in the context of our other proceedings considering the relationship of broadcasting to the public. For instance, some will assert that the explosion in media outlets over the past thirty years (*e.g.*, cable, satellite, the Internet) means that we should impose minimal, if any, public interest requirements on broadcasters. The argument is that consumers are so awash in substitutable media that it no longer makes sense to single out broadcasters for special treatment. But in other proceedings, like digital must-carry, we hear a completely different story. In digital must-carry, the argument is that broadcasting still provides a unique service, especially to the 30% of Americans who do not subscribe to cable, and that because of this special role, broadcasting is entitled to special treatment by the government. Both of these cannot be true. Either broadcasting is special and worthy of special concern or it is not.").

[19] *NPRM* at ¶ 15; *see also id.* at ¶ 18 ("Establishing a specific list of *per se* requirements or prohibitions would lend clarity to, and thus expedite, the negotiation process and would

First, the Commission should declare that any attempt by a broadcaster to impose non-optional tying arrangements on a competing MVPD in exchange for retransmission consent will be deemed a *per se* violation of the "good faith" requirement and shall be actionable as such.[20] The legislative history of the 1999 Act reflects that Congress was aware of the discriminatory impact of non-optional tying arrangements, and expected the Commission to regulate such arrangements to minimize anticompetitive harm to competing MVPDs and their customers. As noted by Senator Kohl, "At the very most, a 'competitive marketplace' would tolerate differences based upon legitimate cost justifications, but not anti-competitive practices such as illegal tying and bundling."[21]

Moreover, there simply is no legitimate public interest justification for permitting Fox and the other television networks to effectively force competing MVPDs and their customers to subsidize the networks' investments in cable programming services,

---

do likewise with respect to our enforcement mechanism . . . .") and ¶ 19 ("While we will resolve each case on its own merits, adding specification to our rules should add certainty to the negotiation process and reduce the number of cases presented to the Commission for adjudication.").

[20] By "non-optional tying arrangements," BellSouth is referring to situations where a broadcaster withholds retransmission consent unless an MVPD also agrees to carry additional cable programming services in which the broadcaster has a management or economic interest. BellSouth would not object to a Commission rule that permits a broadcaster to offer an MVPD a discount on a package of the broadcaster's cable networks and local television signal, provided that the MVPD is not forced to carry those networks as a *quid pro quo* for retransmission consent.

[21] *See* Statement of Senator Herbert Kohl, 145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999).

particularly in view of the fact that non-DBS competitors (*e.g.*, cable overbuilders, wireless cable operators, OVS systems, SMATV operators) do not serve enough subscribers to have a material impact on the success or failure of a cable network.[22] Absent a critical mass of subscribers, there is no "competitive market consideration" that could conceivably justify the imposition of such a burden on non-DBS competitors, and any Commission decision to the contrary would represent a *de facto* retrenchment from the Commission's ongoing commitment to *removing* entry barriers for cable's competitors.[23]

---

[22] *See Horizontal Ownership Third R&O* at ¶ 41 (cable industry estimates that access to 15-20 million subscribers is necessary to ensure economic viability of a cable network). It is no answer to suggest that the legality of tying arrangements can be handled as a matter of antitrust enforcement, and thus should be the exclusive province of the Department of Justice. The Commission has long recognized that its obligation to protect the public interest stands separate and apart from that of the Department of Justice, and that the Commission may take action to eliminate anticompetitive behavior irrespective of how such matters are handled under antitrust law. *See Tele-Communications, Inc. And Liberty Media Corporation*, 9 FCC Rcd 4783, 4786-7 (CSB, 1994) ("The Commission's mandate to consider competitive issues as part of the public interest standard under the Communications Act is a separate and distinct obligation from the Department of Justice's responsibility to enforce the antitrust laws. Indeed, separate review by the Department of Justice and the Commission is common. As the Commission noted in *ABC Cos., Inc.* [citation omitted], 'the standards governing Department of Justice review and the action of the Commission are significantly different. The Antitrust Division is charged with the enforcement of the antitrust laws . . ., while the Commission is charged with effectuating the policies of the Communications Act.'").

[23] *See, e.g., Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution* Service, 11 FCC Rcd 19276 (1996) (Commission preempts certain non-federal restrictions on deployment of antennas used to receive wireless cable service); *Id.*, 13 FCC Rcd 23874 (1998) (Commission extends antenna preemption rule to rental properties); *Telecommunications Services - Inside Wiring*, 13 FCC Rcd 3659 (1997) (adoption of rules to improve competitors' access to "home run" wiring in multiple dwelling units).

Second, any attempt by a broadcaster to extract discriminatory and "anticompetitive market consideration" from an alternative MVPD in exchange for retransmission consent should be deemed a violation of the "good faith" requirement unless the broadcaster sustains a high burden of proof that such consideration is cost-justified and no higher on a per-subscriber basis than what is required of by incumbent cable operators against whom the MVPD competes.[24/] For example, as BellSouth and other competitors have repeatedly pointed out where cable network programming is concerned, the Commission's enforcement of its existing price discrimination rules for such programming effectively gives cable programmers an unlimited right to offer steep volume discounts exclusively to the cable MSOs, even where those discounts bear no reasonable relationship to any cost savings.[25/] While such discounts might represent

---

[24/] Unlike what is usually the case with cable networks, local affiliates of the national television broadcast networks are often compensated for carrying network programming. Moreover, any costs of uplinking cable network programming to satellites for delivery to cable headends do not exist in the broadcast context, since local broadcast stations generally deliver their signals to cable headends via off-air transmission or fiber optic connections. In addition, where DTV is concerned, broadcast programming is provided over spectrum for which local television stations paid nothing. Accordingly, BellSouth submits that it is entirely appropriate to require a broadcaster to sustain a high burden of proving that any consideration they receive as a condition of retransmission consent is necessary to recoup any costs of delivering programming not already recouped by affiliate fees and/or national and local advertising.

[25/] *See* 47 U.S.C. § 548(c)(2)(B)(iii); 47 C.F.R. § 76.1002(b)(3). Also problematic is the fact that the Commission's price discrimination rules for cable programming allow for price differentials based on "direct and legitimate economic benefits" to the programmer, a concept so vague that it effectively escapes meaningful scrutiny by the Commission. *Id.* For instance, according to a recent study submitted to the Commission by Ameritech New Media, Inc., a small MVPD carrying the 19 basic cable networks included in the study would pay approximately $27.13 more per subscriber per year than would an MVPD receiving the average industry discount — and even more over and above the amount paid a legitimate business strategy in a fully competitive environment, in today's environment they are available *only* to cable MSOs *that do not compete with each other.*[26] Moreover, the price discrimination criteria for program access have proven to be difficult to apply in case-by-case adjudications of price discrimination complaints.[27] Perhaps not coincidentally, Congress specifically chose not to incorporate the price discrimination criteria for program access into the retransmission consent provisions of the 1999 Act, and instead left the matter entirely to the Commission's discretion.

BellSouth therefore urges the Commission to exercise that discretion in favor of consumers by applying stringent price discrimination criteria to certain types of optional tying arrangements associated with retransmission consent. Specifically, where a

---

by large MSOs receiving the maximum off-rate card discounts. Dertouzos and Wildman, Programming Access and Effective Competition in Cable Television," at 5 (August 14, 1998) (submitted as Appendix A to Comments of Ameritech new Media, Inc., MM Docket No. 92-260 (filed August 14, 1998)). The study concluded as follows:

> It is hard to rationalize price differentials of this magnitude with the standard efficiency and incentive explanations for quantity discounts. Reduced delivery costs cannot explain such large price differences either, because a network's signal falls automatically on all cable headends within its satellite's footprint. Thus, the incremental costs of making a network available to an additional (wireline) MVPD should be close to zero, regardless of how many subscribers it has.

Id.

[26] *See 1999 Cable Attribution Report and Order*, at ¶ 37 ("In the case of programming, each of TCI's partners can purchase at a low price cable programming networks that TCI has chosen to do business with. We find it unlikely that the TCI partners would purchase the same cable networks at a higher price from a company other than TCI's subsidiary, SSI.").

[27] *See, e.g., Turner Vision, Inc. et al. v. Cable News Network, Inc.*, 13 FCC Rcd 12610, 12611-12 (CSB, 1998).

broadcaster attempts to discriminate against a competing MVPD by charging it more for any affiliated cable network programming the broadcaster makes available to a competing incumbent cable operator in tandem with retransmission consent, that discriminatory treatment should be deemed a *per se* violation of the "good faith" requirement, unless the broadcaster sustains a high burden of proof that such discriminatory consideration is cost-justified or otherwise represents a legitimate economic benefit that does not have the purpose or effect of producing anticompetitive market conditions.

Finally, consistent with prior Commission rulings in the program access arena, the Commission should declare that any retransmission consent agreement that ties an MVPD's right to carry a local television station to that MVPD's attainment of a minimum subscriber penetration level discriminates against competing MVPDs and in favor of incumbent cable operators, and thereby constitutes a *per se* violation of the "good faith" requirement.[28] It will almost universally be the case that penetration requirements in retransmission consent agreements will be far more easily satisfied by incumbent cable operators, whose penetration levels dwarf those of cable overbuilders, wireless cable operators, OVS operators, SMATV providers and, to a lesser extent,

---

[28] See *Outdoor Life*, 13 FCC Rcd at 12235 ("[T]he [Outdoor Life and Speedvision] Networks assert that their proposed exclusivity arrangement would be offered on a technologically neutral basis to all qualified MVPDs, not just to cable operators. Specifically, the Networks state that exclusivity would be available to any MVPD . . . with 'sufficiently high subscriber penetration' that is willing to launch, or substantially increase distribution of, one of the Networks immediately. . . We find, . . ., that a 'sufficiently high subscriber penetration requirement' is a criterion that discriminates against alternative MVPDs and in favor of incumbent cable operators.").

DBS.[29] Simply stated, minimum penetration requirements discriminate against cable's competitors and thus should be banned outright by the Commission.[30]

B. The Commission Should Not Relinquish Its Jurisdiction Over Exclusive Retransmission Consent Agreements Without A Clear And Unequivocal Mandate From Congress To Do So.

Section 76.64(m) of the Commission's Rules, which has remained in force since 1993, prohibits a broadcaster from entering into an exclusive retransmission consent agreement with any MVPD.[31] Section 325(b) of the Communications Act of 1934, as amended by Section 1009(a) of the 1999 Act, requires the Commission to adopt regulations that, until at least January 1, 2006, "prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts . . . ."[32] While acknowledging that the legislative history of the 1999 Act "contains no language to clarify or explain the prohibition [on exclusivity],"[33] the Commission states that Section 1009(a) "would seem to sunset any prohibition on exclusive retransmission consent contracts for all multichannel video program distributors," and, under this

---

[29] *See LMDS Sixth NPRM* at ¶ 25 (citing statistics indicating that wireless cable operators hold a market share of 1.3%, SMATV 1.2%, OVS less than 1%, and DBS and C-Band Satellite Service 12%).

[30] Of course, even where a *per se* violation is not readily apparent, the Commission's case-by-case review of "good faith" complaints should include a review of *all* relevant facts and circumstances, to ensure effective regulation of discriminatory conduct that, although not a *per se* violation on its face, constitutes a violation of the duty to negotiate in good faith when viewed in the context of other suspect behavior.

[31] 47 C.F.R. § 76.64(m).

[32] 47 U.S.C. § 325(b)(3)(C).

[33] *NPRM* at ¶ 21.

reading of the statute, "the Commission's rule prohibiting exclusive retransmission consent agreements for cable operators would be deemed abrogated as of January 1, 2006."[34]

At no point in the 1999 Act or its legislative history did Congress permanently repeal Section 76.64(m) or otherwise manifest any intent to strip the Commission of its jurisdiction over exclusive retransmission consent agreements after January 1, 2006.[35] Section 1009(a) merely requires the Commission to adopt rules that prohibit such agreements until that date; the statute says nothing about the Commission's authority to regulate such agreements thereafter. Where Congress intends to repeal a Commission rule or sunset the Commission's regulatory authority in a particular area, it does so explicitly.[36] That Congress chose not to do so here strongly suggests that it

---

[34] *Id.* at ¶ 24.

[35] *See, e.g.,* 47 U.S.C. § 151 (the Commission shall "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service . . . ."); Id. § 303(r) (Commission has the power to issue rules and regulations "as public convenience, interest and necessity requires"). *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (Congress granted the Commission "expansive powers" through the Communications Act).

[36] *See, e.g.,* 47 U.S.C. § 309(j)(13)(F) (Commission's authority to issue pioneer's preferences "shall expire on August 5, 1997"); Telecommunications Act of 1996, § 202(f)(1) (in eliminating its restrictions on cross ownership between cable television and the national television broadcast networks, "the Commission shall revise section 76.501 of its regulations . . . to permit a person or entity to own or control a network of broadcast stations and a cable system."). *See also United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("[t]he intention of the legislature to repeal 'must be clear and manifest.'") (citations omitted)

did so intentionally, and that it therefore did not intend to divest the Commission of its authority to regulate exclusive retransmission consent agreements.[37]

Furthermore, the Commission's reading of Congress's reference to "January 1, 2006" in Section 1009(a) runs afoul of the principle that federal statutes must be "examined as a whole, giving due weight to design, structure, and purpose . . . to aggregate language."[38] It is clear from the legislative history of the 1999 Act that Congress intended to *promote* competition to cable and *expand* consumer choice in the MVPD marketplace.[39] By contrast, the Commission's proposed abandonment of its ban on exclusive retransmission consent agreements would, regardless of the public need or interest, permit incumbent cable operators to eviscerate competition by entering into exclusive retransmission consent agreements that deny their competitors full and fair access to broadcast programming. Given that consolidation among the

---

[37] *See Russello v. United States*, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[38] *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996). *See also King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("The cardinal rule [is] that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (citation omitted).

[39] *See, e.g.,* Remarks of Rep. Thomas J. Bliley, 145 Cong. Rec. H2319 (daily ed. April 27, 1999) ("[T]his is a significant bill because it will promote genuine competition in the video programming marketplace. For too long now consumers have sought competitive choices to their incumbent cable operators. . . This bill will facilitate satellite-delivered local broadcast programming and, as such, shift satellite television into higher gear in its quest to compete with cable.").

cable MSOs has already prompted broadcasters to surrender exclusivity for their cable network product, the Commission's ban on exclusive retransmission consent agreements is all that stops the MSOs from demanding and receiving exclusivity for broadcast programming. Thus, in view of the procompetitive focus of the 1999 Act, and before it the Telecommunications Act of 1996 and the 1992 Cable Act, the Commission's proposed relinquishment of its jurisdiction over exclusive retransmission consent agreements simply is not a logical assessment of Congressional intent and should be rejected as such.

The Commission also asks whether the exclusivity language in Section 1009(a) should be interpreted as permitting broadcasters to enter into exclusive retransmission consent agreements immediately, provided that those agreements do not go into effect until January 1, 2006 or later.[40] BellSouth submits that the answer to this question is no, for the following reasons: (1) Section 76.64(m) of the Commission's Rules bans *all* exclusive retransmission consent agreements regardless of when they go into effect, and Congress did not repeal or modify the rule aside from requiring that the ban remain in effect at least until January 1, 2006; (2) were the Commission to extend the ban beyond that date (either on its own motion or in response to subsequent legislation), it would be faced with the difficult problem of voiding such "deferred exclusivity" agreements retroactively, a matter which likely would ensnare the agency in a web of costly and time-consuming litigation; and (3) the current trend, as discussed above, has

---

[40] *NPRM* at ¶ 23.

been an increase in cable's overall market power in local broadcast markets, not a decrease. Finally, as to what the Commission should do about exclusive retransmission consent agreements that existed prior to passage of the 1999 Act,[41] the simple answer is that the Commission should void them immediately as required under Section 76.64(m), since the rule remains in effect to this day.[42]

C. The Commission's Retransmission Consent Complaint Procedures Should Be Designed To Minimize Delay And Provide Complainants With Access To Material Evidence In The Exclusive Possession Of The Broadcaster.

With certain qualifications, BellSouth supports the Commission's proposal to use its Section 76.7 special relief procedures when reviewing alleged violations of the exclusivity or good faith provisions of the 1999 Act.[43] First, it is absolutely essential that those procedures provide for expedited review and resolution of any complaint filed by a competing MVPD. The unavoidable reality is that multichannel video is a *service*-oriented business, and that subscribers first and foremost are buying the programming provided by a competing MVPD, not the underlying technology used to deliver that

---

[41] *Id.* at ¶ 24.

[42] As to discriminatory retransmission consent agreements, BellSouth recommends that the Commission's "good faith" rules apply to any such agreements entered into before or after November 29, 1999, the date on which the 1999 Act became law. It is well settled that federal statutes may supersede preexisting private economic relationships where necessary to give full effect to Congressional intent. *See, e.g., Bowen v. Georgetown University Hospital,* 488 U.S. 204, 219 (1988). Since many retransmission consent agreements run anywhere from three to ten years, any failure by the Commission to apply the good faith requirement to preexisting retransmission consent agreements would effectively nullify the effect of the statute in many markets throughout the United States.

[43] *NPRM* at ¶ 26.

programming to the subscriber's home. As a result, subscribers will not tolerate any loss of broadcast programming from a competing MVPD's channel lineup during the pendency of a retransmission consent complaint. Instead, they will turn immediately to incumbent cable operators who are ready, willing and able to provide that programming pursuant to their retransmission consent agreements with local television stations.

BellSouth therefore recommends that the Commission apply the expedited procedures in new Section 325(e) of the Communications Act to any exclusivity/good faith complaint filed by a competing MVPD. Those procedures, which already apply where a broadcaster alleges that an MVPD has illegally retransmitted its signal without retransmission consent, require 45-day processing of complaints and expedited enforcement of any Commission orders in the United States District Court for the Eastern District of Virginia.[44] For exclusivity/good faith complaints, BellSouth recommends that (1) the defendant's answer be filed within fifteen (15) days of the filing of the aggrieved MVPD's complaint; (2) the complainant's reply pleading be filed within seven (7) days of submission of the defendant's answer; and (3) a final decision be rendered by the Cable Services Bureau no later than 45 days from the close of the pleading cycle. However, because Congress has directed the Commission to enforce the 1999 Act's exclusivity/good faith provisions at least until January 1, 2006, the Commission should impose no time limitation on an aggrieved MVPD's right to file an

[44] 47 U.S.C. § 325(e).

exclusivity/good faith complaint with the Commission or seek court enforcement of a Commission order relating thereto unless and until the Commission determines via a further rulemaking that it will sunset its exclusivity/good faith rules on or after January 1, 2006.[45]

Equally important, the Commission should prohibit a broadcaster from withdrawing any existing retransmission consent given to an aggrieved MVPD while the MVPD's exclusivity/good faith complaint remains pending before the Cable Services Bureau or the full Commission. Broadcasters already enjoy similar protection where a cable operator seeks to drop a broadcast signal via the Commission's market modification process (*i.e.*, where the cable operator files a request to delete its communities from the broadcaster's Designated Market Area ("DMA"), the cable operator cannot drop the broadcast signal until the Commission issues a final ruling granting the cable operator's request).[46] Basic considerations of fairness dictate that aggrieved MVPDs be accorded the same benefit during the course of a retransmission consent dispute, so as to ensure that their customers do not suddenly lose access to local broadcast signals while the legality of a broadcaster's conduct during the retransmission consent process is under Commission review.

---

[45] Currently, Section 325(e)(12) prohibits a broadcaster from filing any complaint with the Commission or any action in federal district court to enforce any Commission order relating thereto after December 31, 2001.

[46] *See Dynamic Cablevision of Florida, Ltd.*, 12 FCC Rcd 9952, 9960 (1997) (cable operator may not drop local broadcaster while market modification petition remains pending before the Cable Services Bureau or the full Commission).

Finally, the Commission requests comment on whether the burden of proof in an exclusivity/good faith proceeding should rest with the complaining party until it has made a *prima facie* showing, and then shift to the defending party thereafter.[47] BellSouth asks the Commission to recognize the fundamental unfairness of requiring a retransmission consent complainant to make a *prima facie* case without the benefit of discovery. That is, a complaining MVPD is caught in a proverbial "catch-22": it must present a *prima facie* case to obtain access to critical documents in the broadcaster's exclusive possession, without which a *prima facie* case cannot be made.

Accordingly, the Commission's Rules should provide that an aggrieved MVPD shall be deemed to have established a *prima facie* case where the MVPD's complaint includes allegations of unlawful exclusivity or discrimination which, if proven to be true, would constitute a violation of the exclusivity/good faith provisions of the 1999 Act. Further, where a complaining MVPD satisfies this requirement, the Commission should shift the burden of proof to the defendant broadcaster and require it to include with his or her answer a copy of any retransmission consent agreement(s) with any competing MVPD(s) which the complainant alleges to include unlawfully different terms and conditions, subject to whatever confidentiality protection the Commission deems appropriate under the circumstances. This procedure will provide the complainant and the Commission with immediate access to the most critical evidence at issue, without burdening the Commission's staff with the task of designing and implementing

[47] *NPRM* at ¶ 27.

customized discovery procedures for every individual case and entertaining the inevitable objections thereto from defending parties. Given the need for expedited review of exclusivity/good faith complaints, the Commission can and should minimize such burdens wherever possible.[48]

III. CONCLUSION.

This proceeding provides the Commission with an unprecedented opportunity to declare that competition among MVPDs will not be thwarted by retransmission consent agreements between broadcasters and cable incumbents that deny competitors and their customers nondiscriminatory access to broadcast programming. "Local into local" notwithstanding, the fact remains that Congress's vision of a fully competitive MVPD marketplace will not be realized if the Commission's retransmission consent rules permit any other result. BellSouth thus urges that the Commission remain on the pro-

---

[48] Of course, the staff should retain the discretion to request additional discovery where necessary to determine whether the complainant's allegations are true.

competitive course charted by Congress and implement the exclusivity/good faith provisions of the 1999 Act as recommended above.

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH INTERACTIVE MEDIA
SERVICES, INC.
BELLSOUTH WIRELESS CABLE, INC.

By: Thompson T. Rawls II

William B. Barfield
Thompson T. Rawls, II
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(770) 673-2827

January 12, 1999